

CHAPTER 34

SENIOR OFFICERS LEGAL ORIENTATION

FOREIGN AND DEPLOYMENT CLAIMS

Outline of Instruction

I. INTRODUCTION.

II. REFERENCES.

- A. Foreign Claims Act, 10 U.S.C. § 2734.
- B. International Agreement Claims Act, 10 U.S.C. §§ 2734a & b.
- C. Federal Tort Claims Act, 28 U.S.C. §§ 2671-80.
- D. Personnel Claims Act, 31 U.S.C. § 3721.
- E. Military Claims Act, 10 U.S.C. § 2733.
- F. AR 27-20, Claims, Chapters 7 & 10 (31 December 1997).
- G. DA Pam 27-162, Claims, Chapters 7 & 10 (1 April 1998).
- H. Disaster Claims Handbook (November 1998).
- I. JA 422, Operational Law Handbook, Chapters 9 (2002).

- J. JAGMAN, Chapter VIII.
- K. JAGINST 5890.1, Enclosure 2.
- L. AFI 51-501, Tort Claims, Chapter 4 (1 May 1996).
- M. DoD Directive 5515.8, Single-Service Assignment of Responsibility for Processing of Claims (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, “Single-Service Assignment of Responsibility for Processing of Claims”, (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996).
- N. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, 19 June 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846, 199 U.N.T.S. 67 (NATO SOFA) (Article VIII).
- O. Agreement to Supplement the Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of their Forces with Respect to Foreign Forces Stationed in the Federal Republic of Germany, with Protocol of Signature, 3 August 1959, 14 U.S.T. 631, T.I.A.S. No. 5351, 481 U.N.T.S. 262 (Supplementary Agreement or SA) (Article 41).

III. CLAIMS LAWS APPLICABLE IN MILITARY OPERATIONS.

- A. Federal Tort Claims Act (FTCA). 28 U.S.C. §§ 1346(b), 2402, 2671-80; 28 C.F.R. Part 14; AR 27-20, chapter 4; JAGINST 5890.1, Encl (1); AFI 51-501, chapter 2.

1. The Federal Tort Claims Act provides a limited waiver of sovereign immunity to compensate eligible claimants for damage to property, personal injury, or death based upon the negligent or wrongful acts or omissions of servicemembers or federal civilian employees acting within the scope of employment.
2. Overseas Exception.
 - a. The United States has not waived its immunity from suit for claims arising in a “foreign country.”
 - b. A “foreign country” is any land area outside the control of the United States. *Smith v. United States*, 507 U.S. 197 (1993) (Antarctica); *Meredith v. United States*, 330 F.2d 9 (9th Cir.), *cert. denied*, 379 U.S. 867 (1964) (grounds of American embassy abroad); *Miller v. United States*, 73 F.3d 878 (9th Cir. 1995) (military hospital in Japan); *Callas v. United States*, 253 F.2d 838 (2d Cir. 1958) *cert. denied*, 357 U.S. 936 (1958) (U.N. trusteeship); *Bird v. United States*, 923 F. Supp. 338 (D. Conn. 1996); *Kinsley v. United States*, 817 F. Supp. 680 (S.D. Ohio, 1993); *Pignataro v. United States*, 172 F. Supp. 151 (E.D.N.Y. 1959) (air space over foreign countries).
 - c. The overseas exception does not bar torts occurring on the high seas or in aircraft flying over the high seas. Maritime statutes will usually govern resolution of the claim in these situations. 46 U.S.C. §§ 741-752 (Admiralty Act); 46 U.S.C. §§ 781-790 (Public Vessels Act).
 - d. Exception to the exception. *In re Paris Air Crash*, 399 F. Supp. 732 (C.D. Calif. 1975) (where negligence occurs in the United States but the effect occurs in a foreign country, the claim is not barred).
3. Disaster Relief Operations Involving Debris Removal. (Stafford Act, 42 U.S.C. §§ 5121 et. seq.).
 - a. By administrative agreement, states assume responsibility for processing claims in the aftermath of “major disasters” under 42 U.S.C. § 5173.

- b. States indemnify the United States as a condition to receiving federal assistance. 42 U.S.C. § 5173(b).
- c. Applies to debris removal only, but other claims may be barred by the FTCA's discretionary function exception.

B. Personnel Claims Act (PCA). 31 U.S.C. § 3721; AR 27-20, chapter 11; JAGINST 5890.1, Encl (5); AFI 51-502.

- 1. Limited protection to service members and certain civilian employees for loss or damage to tangible personal property that occurs incident to service.
- 2. Applies worldwide.
- 3. PCA claims that arise in deployments include loss of equipment and personal items during transportation, certain losses while in garrison quarters, losses suffered in an emergency evacuation, losses due to terrorism directed against the United States, and the loss of clothing and articles being worn while performing military duties.
- 4. Maintain positive morale.
- 5. Claims offices should make maximum use of small claims procedures when appropriate. AR 27-20, paras 2-17 and 11-10b; DA Pam 27-162, paras 2-17 and 2-42.
 - a. The small claims procedure applies to claims that do not require extensive investigation and can be settled for less than \$1000.
 - b. Evidentiary requirements are relaxed, with greater emphasis placed on using catalog prices, telephone calls to confirm prices, and agreed cost of repairs and loss of value procedures. Remember, however, that estimates are required for repairs over \$100.00.

- c. Where local finance procedures permit, small claims should be approved on the spot, and the claimant allowed to hand-carry the voucher for immediate cash payment.

C. Military Claims Act (MCA). 10 U.S.C. § 2733; AR 27-20, chapter 3; JAGINST 5890.1, Encl (2); AFI 51-501, chapter 3.

- 1. A claim for personal injury, death, or damage to or loss of property is payable when:
 - a. Caused by a negligent or wrongful act or omission of military personnel or DA civilians acting within the scope of employment; or
 - b. Incident to the noncombat activities of the Department of the Army.
- 2. Applies worldwide.
 - a. CONUS tort claims must first be considered under the FTCA.
 - b. Overseas, the MCA will apply only when the claim cannot be paid under the PCA or the Foreign Claims Act (FCA).
 - c. Most common applications of the MCA.
 - (1) Medical malpractice on family members overseas.
 - (2) Property damage claims by service members not payable under the PCA or FTCA.
- 3. Not a waiver of sovereign immunity.
- 4. Applicable law.

- a. General principles of law applicable in a majority of American jurisdictions.
 - b. Contributory negligence. Apply the law of the place of the occurrence, including the law of foreign countries when the claim arises in a foreign country.
- D. Foreign Claims Act (FCA). 10 U.S.C. § 2734; AR 27-20, chapter 10; JAGMAN, chapter VIII; AFI 51-501, chapter 4.
 - 1. History.
 - a. Act of 18 April 1918.
 - b. WWII changes.
 - c. The Foreign Claims Act comes of age.
 - 2. Purpose.
 - a. "To promote and to maintain friendly relations through the prompt settlement of meritorious claims." 10 U.S.C. § 2734(a).
 - b. Claim must be "meritorious." Undue emphasis should not be placed on the promotion and maintenance of friendly relations alone. Claims that are not meritorious will be denied even though payment might promote friendly relations.
 - 3. Scope.
 - a. Applies only overseas. Claim must arise outside the U.S., its territories, Commonwealths, or possessions.

- b. Includes places under the jurisdiction of the United States in a foreign country.
 - c. Maritime claims.
 - (1) Incidents occurring within the territorial waters of the United States do not give rise to FCA claims.
 - (2) Chapter 8, AR 27-20 governs maritime claims. Claims cognizable under this chapter will not be processed under the FCA without the express authorization of the Commander, U.S. Army Claims Service.
- 4. Proper claimants.
 - a. Governments of foreign countries and political subdivisions thereof.
 - b. "Inhabitants" of foreign countries.
 - (1) Citizenship or legal domicile not necessary.
 - (2) Mere presence insufficient.
 - (3) Can include U.S. citizens residing overseas.
 - c. Corporations.
- 5. Improper claimants.
 - a. Enemy or "unfriendly" nationals.
 - b. Insurers and subrogees.

- c. U.S. military personnel, Federal civilian employees, and their family members residing overseas primarily because of their own or their sponsor's duty or employment status.
- d. Other residents of the United States; i.e, visitors, tourists, and persons employed overseas.

6. Claims payable.

- a. Noncombat activities. This includes personal injury, death, personal property damage, and damage to real property that occurs connection with training, field exercises, or maneuvers or other activities which are distinctly military in nature.
- b. Negligent or wrongful acts of U.S. military personnel or civilian employees.
 - (1) If the civilian employee is a U.S. citizen or foreign national recruited or transferred from a country other than the one in which he or she is employed and where the incident occurred, the negligent or wrongful act need not be within scope of employment.
 - (2) If the civilian employee is a foreign national recruited in the country in which he or she is employed and where the incident occurred, claim is payable only if the negligent or wrongful act was within scope of employment. Exception for vehicle claims. AR 27-20, para 10-3.
 - (3) Distinction relates back to the purpose of the FCA. Maintaining friendly relations with foreign countries and their inhabitants is not furthered by accepting responsibility for the off-duty torts of employees who are in a foreign country through no act of the United States.

7. Claims excluded. AR 27-20, para 10-4.

- a. Claims under status of forces or other international agreements.
- b. "Enemy action" - direct and indirect combat activities. *United States v. Marks*, 187 F.2d 724 (9th Cir. 1951), *cert. denied*, 342 U.S. 823 (1951).
 - (1) Includes preparation for, movement to, and return from combat.
 - (2) Aircraft en route exception.
- c. Contracts and domestic obligations.
- d. Real estate claims founded upon contract. *See* AR 405-15.
- e. Not in best interests of U.S. or contrary to public policy, general principles of equity, or the basic intent of FCA.

8. Procedures.

- a. Presentation of Claim.
 - (1) "Normally" in writing to U.S. or authorized official.
 - (2) Within two years of accrual.
 - (3) Must state:
 - (a) The time, place, and nature of the incident.
 - (b) The nature and extent of damage, loss, or injury.

- (c) The amount of compensation claimed.
- b. Claims Settlement - Foreign Claims Commissions (FCC).
 - (1) FCA claims are settled and paid by FCCs.
 - (2) Appointment authority. AR 27-20, para 10-6.
 - (a) Senior Judge Advocate of a command having a command claims service. May be delegated to commander or chief of the command claims service.
 - (b) Commander, U.S. Army Claims Service.
 - (3) Composition. AR 27-20, para 10-7.
 - (a) One-member FCC. May be a commissioned officer or claims attorney.
 - (b) Three-member FCC. At least two members must be JAs or claims attorneys.
 - (4) Investigation.
 - (a) Normally, the FCC is responsible for the investigation of all claims referred to it.
 - (b) Can request assistance from units.
 - (c) AR 27-20, Chapter 2 and local procedures apply.

- (5) Applicable law. The law and custom of the country where the incident occurred, including laws and customs pertaining to contributory or comparative negligence and joint tortfeasors.
- (6) Payments.
 - (a) Made in the currency of the country in which the incident occurred or where the claimant resided at the time of the incident.
 - (b) Punitive damages, interest, court costs, bail, costs of filing a claim, and similar fees are not allowed.
 - (c) Deduct amounts paid by tortfeasor, other third parties, and insurance companies.
 - (d) Advance payments up to \$10,000 permitted in limited circumstances.
 - (e) Generally, payments are final and not subject to appeal.
- (7) Approval authorities. AR 27-20, para 10-9.
 - (a) One member FCC.
 - (i) If JA or claims attorney, may pay up to \$15,000 regardless of amount claimed. May also disapprove any claim presented in an amount not over \$15,000.
 - (ii) Other one-member FCCs may pay claims presented in an amount not exceeding \$2,500. No denial authority.

- (b) Three member FCC.
 - (i) May disapprove claims presented in any amount.
 - (ii) May pay claims filed in any amount which, after adjudication, are deemed to be meritorious in an amount not exceeding \$50,000.
- (c) TJAG, TAJAG, and the Commander, U.S. Army Claims Service.
 - (i) May disapprove any claim.
 - (ii) May approve any claim where the amount awarded does not exceed \$100,000.
- (d) Secretary of the Army, Assistant Secretary of the Army, or designee approves all payments in excess of \$100,000.

IV. CLAIMS UNDER STATUS OF FORCES (SOFA) AND OTHER INTERNATIONAL AGREEMENTS

- A. 10 U.S.C. § 2734a.
- B. Required Provisions.
 - 1. Is there an agreement?
 - 2. Does it contain claims provisions?
 - 3. Does it provide for cost sharing?

C. Preferred Provisions.

1. Do claims provisions mandate host country adjudication?
2. Is the agreement reciprocal?

D. NATO SOFA Model. Article VIII.

1. Provides for host nation adjudication.
2. NATO SOFA is reciprocal. Guidance on processing claims arising out of the acts or omissions of members of a NATO military force or civilian component present in the United States is found in AR 27-20, chapter 7, section II.
3. Claims between Contracting Parties. Art. VIII, paras 1-4.
 - a. Claims for damage to military property.
 - (1) Wholly waived
 - (2) The military property damaged or the military personnel causing the damage must have some relationship with the operation of the Treaty.
 - (3) NATO connection presumed when military property belonging to a NATO sending state is located within the territory of a NATO receiving state.
 - b. Claims for damage to nonmilitary property.
 - (1) Limited waiver for damage to property owned by a Contracting Party but which is not used by that Party's armed services.

- (2) Personnel causing the damage must have some relationship with the operation of the Treaty.
 - (3) Waiver only applies if damage is less than \$1,400; liability for greater damages is split in accordance with SOFA formula.
- c. Claims for injury to or death of a service member.
 - (1) Wholly waived.
 - (2) Injury or death must occur while service member is performing official duties, but such duties need not have any connection with the operation of NATO.
 - (3) Waiver does not extend to civilian employees.
 - (4) Waiver extends only to claims between Contracting Parties. It does not affect third party claims under Article VIII.

4. Third Party Scope Claims. Art. VIII, para 5.

- a. Proper claimants include persons and entities that are not Contracting Parties or members of the force or civilian component.
 - (1) Includes tourists and business travelers from the United States.
 - (2) Also includes inhabitants of foreign countries.
 - (3) May include family members of sending state forces.

- b. Claim is payable if damage, injury, or death results from an act or omission done by a member of the force or civilian component in the performance of official duties or under circumstances that would make the force otherwise “legally responsible” under the law of the receiving state.
 - (1) Sending state makes the scope of employment determination.
 - (2) Normally, the sending state’s determination is final. Rare disputes are settled by arbitration.
- c. Claims are filed with receiving state authorities. The receiving state must designate offices where claims may be presented. Example: In Germany, claims are filed with the Defense Cost Office, a subsidiary of the Ministry of Finance.
- d. Time limits for filing third party scope claims are often substantially less than the two years allowed under the FCA or MCA. Example: The DCO in Germany requires that a claim be filed within 90 days of the date it accrues.
- e. Upon receipt of a claim, the receiving state investigates. The sending state cooperates in the investigation, providing information about the involvement of its forces and issuing a scope of employment certification.
- f. Receiving states adjudicate the claim under their domestic law. If deemed meritorious, the receiving state makes the award and pays the claimant.
- g. The receiving state reports all payments to the sending state, proposes distribution of the costs incurred, and requests reimbursement. Normally costs are split as follows: 75% sending state; 25% receiving state.

5. Nonscope Claims. Art. VIII, paras 6-7.

- a. Often referred to as *ex gratia* (out of grace) payments. Do not confuse with solatia payments discussed later in the outline.

- b. Nonscope claims arise in two situations.
 - (1) Tortious off-duty conduct by members of the force or civilian component.
 - (2) Unauthorized use of sending state vehicles.
- c. Receiving states accept, investigate, process, and evaluate nonscope claims.
- d. After assessing the claim's merits (including the measure of damages, if any), the receiving state forwards the claim with a recommendation to the sending state.
- e. The sending state then reviews the claim and the receiving state's recommendation to determine if an *ex gratia* payment will be offered.
 - (1) In the case of the United States as sending state, nonscope claims are adjudicated by FCCs appointed pursuant to the FCA.
 - (2) In adjudicating the claim, the sending state is not bound by the advice and recommendation of the receiving state.
 - (3) If payment is approved, the sending state bears the entire cost.

V. SINGLE-SERVICE RESPONSIBILITY.

- A. Department of Defense Directive 5515.8 (9 June 1990), *as amended by* Memorandum, Office of the General Counsel, Department of Defense, to Director, Joint Staff, subject: Designation of the Department of the Army as Single Service Claims Authority, (22 Sep. 1994), Memorandum, Director, Joint Staff, to Office of the General Counsel, Department of Defense, subject: USEUCOM Request for Change to DoD Directive 5515.8, "Single-Service Assignment of Responsibility for Processing of Claims", (12 Mar. 1996), Memorandum, Office of the General Counsel, Department of Defense, to HQ, USEUCOM/ECDC, subject: USEUCOM Request for Single Service Claims Assignment under DoD Directive 5515.8 (25 Nov. 1996), and other memos referenced in Appendix A assign to each service exclusive responsibility for settling foreign claims in certain countries.
- B. Army - Albania, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, El Salvador, Estonia, Germany, Grenada, Haiti, Honduras, Hungary, Korea, Latvia, Lithuania, Marshall Islands, Moldova, Montenegro, Netherlands, Poland, Romania, Rwanda, Serbia, Slovakia, Slovenia, Switzerland, Ukraine, Receiving Office in U.S. for NATO SOFA.
- C. Navy - Bahrain, Greece, Iceland, Israel, Italy, Portugal, Spain, United Arab Emirates.
- D. Air Force - Australia, Azores, Canada, Cyprus, Denmark, Egypt, France, Greece, India, Iraq, Japan, Luxembourg, Morocco, Nepal, Netherlands, Norway, Oman, Pakistan, Saudi Arabia, Spain, Tunisia, Turkey, United Kingdom, CENTCOM, USSOC.
- E. Interim single-service claims responsibility. Unified and Specified Commanders may assign interim responsibility in countries where such assignment has not been made under the DoD directive. They must seek immediate confirmation and approval of such assignments from the DoD General Counsel.

VI. SOLATIA. AR 27-20, PARAS 10-17 AND 13-13.

- A. Definition. Payment (not necessarily in money) to a victim or a victim's family as an expression of sympathy or condolence. Common in certain parts of the Far East and Southwest Asia.

- B. Local custom determines when solatia applies and customary amount for specific case.
- C. Not an admission of liability.
- D. Paid from command operating funds, not Claims Expenditure Allowance.

VII. CONCLUSION.

APPENDIX A

SINGLE SERVICE CLAIMS PROCESSING ASSIGNMENTS

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ASIA

<u>Country</u>	<u>Assignment</u>	<u>Authority</u>
Japan	Air Force	DoD Directive 5515.8, 9 June 1990
South Korea	Army	DoD Directive 5515.8, 9 June 1990
Vietnam (War era)	Navy	DoD Directive 5515.8, 9 June 1990

PACIFIC

<u>Country</u>	<u>Assignment</u>	<u>Authority</u>
Australia	Air Force	DoD Directive 5515.8, 9 June 1990
Azores	Air Force	DoD Directive 5515.8, 9 June 1990
Marshall Islands	Army	DoD Directive 5515.8, 9 June 1990

EUROPE/LEVANT

<u>Country</u>	<u>Assignment</u>	<u>Authority</u>
Albania	Army	Approval, John H. McNeill, 17 April 1996
Austria	Army	DoD Directive 5515.8, 9 June 1990
Azores	Air Force	DoD Directive 5518.8, 9 June 1990
Belarus	Army	Approval, John H. McNeill, 17 April 1996
Bahrain	Navy	DoD Directive 5515.8, 9 June 1990
Belgium	Army	DoD Directive 5515.8, 9 June 1990
Bosnia-Herzegovina	Army	Memo, David A. Koplow, 7 July 1999
Bulgaria	Army	Approval, John H. McNeill, 17 April 1996
Canada	Air Force	DoD Directive 5518.8, 9 June 1990
Croatia	Army	Memo, David A. Koplow, 7 July 1999
Cyprus	Air Force	DoD Directive 5515.8, 9 June 1990

Czech Republic	Army	Approval, John H. McNeill, 17 April 1996
Denmark	Air Force	DoD Directive 5515.8, 9 June 1990
Estonia	Army	Approval, John H. McNeill, 17 April 1996
Egypt	Air Force	DoD Directive 5515.8, 9 June 1990
France	Air Force	Memo, William H. Dalton, 25 November 1996
Germany	Army	DoD Directive 5515.8, 9 June 1990
Greece	Navy	Memo, John H. McNeill, 01 September 1994
Hungary	Army	Approval, John H. McNeill, 17 April 1996
Iceland	Navy	DoD Directive 5518.8, 9 June 1990
India	Air Force	DoD Directive 5515.8, 9 June 1990
Iraq	Air Force	Approved, Terrence O'Donnell, 14 June 1991
Israel	Navy	DoD Directive 5515.8, 9 June 1990
Italy	Navy	DoD Directive 5515.8, 9 June 1990
Latvia	Army	Approval, John H. McNeill, 17 April 1996
Lithuania	Army	Approval, John H. McNeill, 17 April 1996
Luxembourg	Air Force	DoD Directive 5515.8, 9 June 1990
Macedonia	Army	Memo, David A. Koplow, 7 July 1999
Moldova	Army	Approval, John H. McNeill, 17 April 1996
Montenegro	Army	Memo, David A. Koplow, 7 July 1999
Morocco	Air Force	DoD Directive 5515.8, 9 June 1990
Nepal	Air Force	DoD Directive 5515.8, 9 June 1990
Netherlands	Army	Memo, John H. McNeill, 01 September 1994
Norway	Air Force	DoD Directive 5515.8, 9 June 1990
Oman	Air Force	DoD Directive 5515.8, 9 June 1990
Pakistan	Air Force	DoD Directive 5515.8, 9 June 1990
Poland	Army	Approval, John H. McNeill, 17 April 1996
Portugal	Navy	DoD Directive 5515.8, 9 June 1990
Romania	Army	Approval, John H. McNeill, 17 April 1996
Rwanda Refugee Crisis Area (except Kenya)	Army	Memo, John H. McNeill, 01 September 1994
Saudi Arabia	Air Force	DoD Directive 5515.8, 9 June 1990
Serbia	Army	Memo, David A. Koplow, 7 July 1999
Slovak Republic	Army	Approval, John H. McNeill, 17 April 1996
Slovenia	Army	Approval, John H. McNeill, 17 April 1996
Spain	Navy	Memo, John H. McNeill, 01 September 1994
Switzerland	Army	DoD Directive 5515.8, 9 June 1990
Turkey	Air Force	DoD Directive 5515.8, 9 June 1990
Ukraine	Army	Approval, John H. McNeill, 17 April 1996
United Arab Emirates	Navy	Approved, John H. McNeill, 6 June 1996
United Kingdom	Air Force	DoD Directive 5515.8, 9 June 1990
Yugoslavia, Fed. Rep.	Army	Approval, David A. Koplow, 7 July 1999
CENTCOM Ops.	Air Force	DoD Directive 5515.8, 9 June 1990

AFRICA

<u>Country</u>	<u>Assignment</u>	<u>Authority</u>
Morocco	Air Force	DoD Directive 5515.8, 9 June 1990
Rwanda	Army	Memo, John H. McNeill, 1 September 1994
Tunisia	Air Force	Memo, John H. McNeill, 17 April 1996

AMERICAS

<u>Country</u>	<u>Assignment</u>	<u>Authority</u>
US- NATO/ Singapore SOFAs	Army	DoD Directive 5515.8, 9 June 1990
Canada	Air Force	DoD Directive 5515.8, 9 June 1990
El Salvador	Army	DoD Directive 5515.8, 9 June 1990
Grenada	Army	DoD Directive 5515.8, 9 June 1990
Haiti	Amry	Memo, John H. McNeill, 22 September 1994
Honduras	Army	DoD Directive 5515.8, 9 June 1990

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